No. 92-484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL.,* IN SUPPORT OF THE PETITIONER

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November 20, 1992

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QUESTION PRESENTED

Whether the inadvertent clerical misplacement of quotation marks in an enrolled statute in 1916 can effect the repeal of Section 92 of the National Bank Act.

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONER

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The national and state-based trade associations sponsoring this brief together represent virtually

every commercial bank in the United States and most of their holding companies (if any) as well.

Commercial banks have relied upon the continued existence of Section 92 of the National Bank Act for the past three-quarters of a century in order to act as general insurance agents in small towns throughout much of the country. It has been an entirely reasonable reliance, since the Comptroller of the Currency, the principal regulator of national banks, has treated the law as remaining in full force and effect, as have the courts, state and federal (including this Court), that have had occasion to deal with the issue, and as has the United States Congress, which has purported to amend Section 92 in two instances. It is a reliance that is not limited to national banks. The laws of approximately 37 states confer upon their own state chartered banks, in addition to their specifically enumerated powers, other powers that are available to national banks under federal law.

It has proven to be extraordinarily difficult to determine the exact number or identity of commercial banks operating insurance agencies under the direct or indirect authority of Section 92. No official records are compiled or kept, but efforts have been made to survey the industry by various parties. The Comptroller's Petition for Writ of Certiorari places the number of national banks doing so at between 90 and 100, and correctly relates that the American Bankers Association and Oregon Bankers Association have estimated a number in the range of 160. (*Steinbrink v. Independent Insurance Agents of America*, No. 92-507, Petition for Writ of Certiorari at 19, n. 11). The United States District Court for the Eastern District of Kentucky, in related litigation, has found that ap-

proximately 179 national banks in fifteen states exercise insurance powers pursuant to Section 92. (*Owensboro National Bank v. Moore*, No. 91-3, slip op. at 10 (E.D. Ky. 1992) (*appeal pending*, Nos. 92-6330, 6331, 6th Cir.)). A 1990 study performed for the Independent Bankers Association of America suggests that the number could be considerably higher than that. (1991 Bank Insurance Activities Survey Conducted by The Independent Bankers Association of America & The Wyatt Company (1990) at 7-10).

In addition to the national banks acting under direct authority of Section 92, the American Bankers Association has identified approximately 130 state-chartered banks, located in small towns. that are offering insurance services to their customers where the only statutory authority to do so is a state law providing that state-chartered banks may provide to their customers whatever services a national bank in the state can provide to customers.

Whatever the exact number of banks, state and national, that have taken advantage of the statutory grant of power to banks located and doing business in small towns, it is clear that this participation is considerable, widespread, and growing. (*See, e.g., Owensboro National Bank v. Moore, supra*, in which three national banks not presently engaged in the insurance business from their locations in small towns are struggling mightily, over the opposition of the insurance industry, to utilize the powers granted by the statute.)

It is to protect the present and future interests of their respective members in the conduct of insurance activities in small towns that the American Bankers Association, Association of Bank Holding Companies, Association of Banks in Insurance, Consumer Bankers

Association, Independent Bankers Association of America, Kansas Bankers Association, Minnesota Bankers Association, Missouri Bankers Association, Oregon Bankers Association and Wisconsin Bankers Association respectfully appear in this case in order to urge the Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Conflict Among The Circuits

In the case below, the District of Columbia Circuit held that Section 92 of the National Bank Act, enacted in 1916, was effectively repealed two years later in the context of the enactment of the totally unrelated War Finance Corporation Act. *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992). Four months after the D.C. Circuit opinion, the Second Circuit explicitly rejected the District of Columbia Circuit's decision, holding that whatever it is that happened in 1918 did *not* effect a repeal of Section 92. *American Land Title Association v. Clarke*, 968 F.2d 150, 152 (2d Cir. 1992), *petitions for cert. pending*, Nos. 92-482, 92-645. Rule 10.1(a) of the Supreme Court Rules provides that one of the "special and important reasons" that will be considered by the Court in granting review on writ of certiorari is "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter."

Section 92 of the National Bank Act was enacted as a part of a then new version of Section 13 of the Federal Reserve Act—a section of the law that also amended a pre-existing, substantively unrelated statute, Revised Statutes section 5202. The placement of a pair of quotation marks in the 1916 statute has given rise to a longstanding academic dispute over the question whether Section 92 was thereby placed within the text of the amended R.S. section 5202 or within the text of Section 13 of the Federal Reserve Act separately from R.S. section 5202. When Congress passed the War Finance Corporation Act (Pub. L. No. 65-121, 40 Stat. 506) in 1918, it re-enacted (with an amendment) R.S. section 5202, without including in the amended text the words of Section 92, leading to the argument that Section 92 was repealed at that time.

Notwithstanding that, every court that has had occasion to interpret and apply Section 92 in the past seventy-five years has treated the law as if it has continued to exist in full force and effect—until the District of Columbia Circuit's decision in the case below. Not only is the Circuit opinion in direct conflict with the Second Circuit's recent opinion, but it is in conflict with all of the other court opinions as well:

- In *Commissioner of Internal Revenue v. First Security Bank of Utah*, 405 U.S. 394, 401-405 (1972), this Court observed that Section 92 had been omitted from the U.S. Code in recent editions, but that the Comptroller of the Currency still considered the law to be in effect. The Court then proceeded to act as if the Comptroller were correct by not attributing income from the sale of insurance to banks that, under Section 92, could not lawfully receive such income.

- In *Commissioner of Internal Revenue v. W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966), the court examined the tax consequences when, in fur-

therance of a merger into a national bank, a state bank was compelled—by Section 92—to spin off its insurance department.

• In *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 n.6 (5th Cir. 1980), the court acknowledged the "considerable discussion" over the correctness of the U.S. Code's omission of Section 92 since 1952, and concluded that the "issue appears to be resolved" in favor of Section 92's continued existence, so much so that "[u]nder these circumstances, further discussion of the issue seems moot." (*See also Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968), in which the existence of Section 92 was unquestionably the necessary predicate to the court's conclusions of law.)

• *Salyersville National Bank v. United States*, 613 F.2d 650, 652 (6th Cir. 1980), was another tax case in which the court followed this Court's *First Security* precedent, noting that "banks in cities over 5000 population had been and were then barred from selling insurance by federal banking law, 12 U.S.C. § 92."

• In *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 736 F.2d 468, 476-77 (8th Cir. 1984), the very same party who is the Respondent here argued that Section 92 of the National Bank Act prohibited national banks in towns with a population over 5000 from acting as insurance agents. Necessary to that argument, of course, is that Section 92 existed in 1984. The Eighth Circuit did not dismiss the argument out of hand, but rather, acting as if Section 92 existed, concluded that it would not be violated by the Federal Reserve's approval of certain insurance activities of two bank holding companies that were sufficiently separated

from the bank subsidiaries of the holding companies so that the activities would not be viewed as those of the banks.

• Even the District of Columbia Circuit itself has, in recent past, acted inconsistently with its new view that Section 92 does not exist. In *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), the court held that the incidental powers clause of the National Bank Act, 12 U.S.C. § 24(Seventh), authorized national banks to act as agent in the sale of credit life insurance, wherever the banks were located. The court analyzed Section 92 and concluded that "by its own terms [section 92] does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." (*Id.* at n.18) The court would not have bothered saying that if Section 92 did not exist. Moreover, it is not an adequate answer to say that no one in *IBAA v. Heimann* asked the court to rule on the existence of Section 92. No one asked the District of Columbia Circuit to rule on that matter in this case either.[1]

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[1] In addition to these Supreme Court and U.S. Court of Appeals decisions, lower federal courts and state courts have discussed, relied on or cited Section 92 innumerable times without ever concluding that it had been repealed. *See Variable Annuities Life Insurance Co. v. Clarke*, 786 F. Supp. 639 (S.D.Tex. 1991), *appeal pending*, No. 92-2010, 5th Cir.; *Owensboro National Bank v. Moore*, No. 91-3 (E.D.Ky. 1992), *appeal pending*, Nos. 92-6330, 6331, 6th Cir.; *Thompson v. Kerr*, 555 F. Supp. 1090, 1096 (S.D. Ohio 1982); *Guaranty Mortgage Co. v. Z.I.D. Associates*, 506 F. Supp. 101, 104(S.D.N.Y. 1980); *Exchange Bank of Commerce v. Meadors*, 199 Okla. 10, 184 P.2d 458, 464 (1947); *Washington Agency Inc. v. Forbes*, 309 Mich.

In light of all the contrary authority, one would almost be tempted to dismiss the District of Columbia Circuit opinion as an aberration, unlikely to recur or be followed elsewhere, except for the fact that the District of Columbia is the home circuit to the Comptroller of the Currency who may be sued there anytime he approves a proposed activity of a national bank pursuant to Section 92, or anytime he promulgates a rule regarding the insurance activities of small town banks in the exercise of the rulemaking powers granted him by Section 92. The insurance industry has already enunciated its intent to follow precisely that strategy. *See* Defendant's and Intervenors' Joint Opposition and Response to Plaintiffs' Memorandum of Supplemental Authorities, *Owensboro National Bank v. Wright*,[2] Civil Action No. 91-3 at 5-6 n.3 (February 1992). The conflict needs to be resolved.

II. The Important Question of Federal Law

We have already pointed out above that the decision of the District of Columbia Circuit below imminently threatens the business operations and settled expectations of a great many state and national banks and their customers. That is coupled with the confusion within the industry and the industry's regulators, state and federal, engendered by two diametrically opposed U.S. Courts of Appeals decisions coming within a few

683, 16 N.W.2d 121, 122 (1944); *Marshall National Bank v. Corder*, 169 Va. 606, 194 S.E. 734, 736 (Va.Ct. App. 1938); *Greene v. First National Bank of Thief River Falls*, 172 Minn. 310, 215 N.W. 213 (1927).

[2] This case has subsequently become known as *Owensboro National Bank v. Moore*, upon replacement of the Insurance Commissioner.

months of one another. Further adding to the equation is the pendency of other litigation in the Fifth and Sixth Circuits[3] that would clearly benefit from this Court's resolution of the issue one way or the other. All together, these factors make this an important question to the business and governmental interests of many parties.

But there is also a question raised in the Circuit opinion that is an important one in a legal sense as well. It is the court's perception of its role in construing and applying statutes. The District of Columbia Circuit was unwilling to "correct[] flaws in the language and punctuation of federal statutes" where to do so would be "to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books." *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 739.

The court's opinion *presumes* that Congress has stricken the laws from the books, *presumes* that "correcting" punctuation errors would have the effect of "reinstating" the law. But in point of fact, proper application of the rules of statutory construction should lead to the conclusion that the law was not repealed in the first place.

We begin with the a proposition set forth by this Court long ago: "The intent, not the letter of the statute, constitutes the law." *Union National Bank of St. Louis v. Matthews*, 98 U.S. 621, 626 (1879). The opinion of the court below gives *no* regard to the intent of Congress—either in 1916 when it enacted Section 92, or in 1918 when it enacted the War

[3] See n. 1 above.

Finance Corporation Act. The District of Columbia Circuit found that the latter repealed the former whether Congress intended that result or not.

This Court has also often invoked "the plain language of the statute itself" as a means of finding and effectuating Congressional intent, not as an end in itself. *See, e.g., Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-75 (1986); *Richards v. United States*, 369 U.S. 1, 9 (1962).

Finally, this Court has held that language is language. It does not include punctuation:

> Punctuation marks are *no part of an act*. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.

United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 82-83 (1932)(emphasis added).

> So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole.

Crawford v. Burke, 195 U.S. 176, 192 (1904).

An examination of the *language* of the applicable statutes shows clearly that Section 92 of the National Bank Act was never placed within Revised Statutes section 5202, so that the subsequent changes to section 5202 had no effect upon Section 92.[4] An ex-

[4] The court below printed the applicable statutes as appendices to its opinion. We reproduce those appendices as appendices to this brief as well for convenience.

amination of the origin of the misplaced quotation marks clearly shows them to be an act of a scribe and not an act of Congress.

Section 5202 of the Revised Statutes of the United States was enacted in 1878, derived from Section 36 of the National Bank Act of 1864 which, in turn, was derived from Section 42 of the National Bank Act of 1863. Generally, it forbade any national bank to be indebted in an amount exceeding its paid-in capital, and then set forth four short exceptions to that general rule.

In 1913, Congress enacted the Federal Reserve Act, Pub. L. 63-64, 38 Stat. 251 (1913). Section 13 of the Act contained a series of unnumbered paragraphs, the sixth one of which amended R.S. section 5202. That paragraph contained five numbered subparagraphs. The first four of them essentially duplicated the original four exceptions to the general prohibition against excess indebtedness of national banks; the fifth one was a new exception for "[l]iabilities incurred under the provisions of *the Federal Reserve Act*" (emphasis added). After the fifth numbered subparagraph, there began a new unnumbered paragraph, authorizing the Federal Reserve Board to adopt restrictions, limitations and regulations upon the rediscount by a Federal Reserve bank of certain bills receivable, foreign bills of exchange and acceptances "authorized by *this Act*" (emphasis added). (See Appendix A.)

The statute clearly did not make R.S. section 5202 a part of the Federal Reserve Act; otherwise the internal reference to "the Federal Reserve Act" in the fifth numbered subparagraph would have been superfluous. Similarly, the unnumbered paragraph following the fifth numbered subparagraph was not made

a part of R.S. section 5202. If it had been intended to be a continuation of the fifth numbered subparagraph, the internal reference to "this Act" would have made no sense whatsoever. R.S. section 5202 contained no authorization of bills of exchange or acceptances. Such an authorization was found in the second and third unnumbered paragraphs of section 13 of the Federal Reserve Act.

In summary, the amendment to R.S. section 5202 was contained only in the sixth unnumbered paragraph including the five numbered subparagraphs. The seventh unnumbered paragraph, like the first five, was part of the then new Federal Reserve Act.

In 1916, Congress amended the Federal Reserve Act. Among other things, the 1916 statute set forth a new version of section 13 of the Act "to read as follows:" The new version (*See* Appendix B) followed the same format as the prior version, containing a series of unnumbered paragraphs. Each of those paragraphs—with one exception—was preceded by quotations marks, which was the grammatically correct thing to do after the phrase "to read as follows." The exception, of course, is what gives rise to the difficulty here. The unnumbered paragraph carrying forward the three-year old amendment to R.S. section 5202 was not preceded by a quotation mark. Textually, this unnumbered paragraph and its five numbered subparagraphs remained unchanged (except the 1916 version refers, in the fifth subparagraph, to the "Federal reserve Act," whereas in the 1913 version, the second word of that phrase also had an initial capital letter). The unnumbered paragraph following the five numbered exceptions was a modification of the same paragraph as had appeared in the 1913 ver-

sion of the Federal Reserve Act. It now provided for the discount, purchase and sale, as well as the rediscount of the same bills receivable, bills of exchange and acceptances "authorized by *this Act*." Again, despite the placement of quotation marks in the 1916 statute, there was no authorization in R.S. section 5202, as amended, for any such bills or acceptances.

As was earlier the case, that authorization appeared only in the Federal Reserve Act itself. Likewise as was earlier the case, R.S. section 5202's fifth numbered exception referred not to "this Act," but rather to "the Federal reserve Act," as a separate and distinct statute. The clear import of the *words* used, therefore, is that the unnumbered paragraph following the five exceptions was not a part of R.S. section 5202. Once that break is made, it is logical and grammatical to assume conclusively that unnumbered paragraphs following the bills of exchange and acceptances paragraph are likewise not part of R.S. section 5202. The unnumbered paragraph immediately following the bills of exchange and acceptances paragraph is the enactment of what subsequently became identified as section 92 of the National Bank Act.

That the placement of the quotations marks in the enrolled statute is an act of a scribe rather than an Act of Congress is beyond question. Lodged with this brief as an Exhibit are copies of the Senate and House Conference Reports on "An Act to amend the Act approved December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, by adding a new section." The Senate version of the Conference Report contains no quotation marks in any relevant spot; the House version of the Conference Report contains handwritten quotation marks,

but in relevant part, those quotation marks are not where they eventually appear in the enrolled statute. The unnumbered paragraph preceding the revision to R.S. section 5202 does not end in a quotation mark in either the House or Senate version of the Conference Report, but it does in the enrolled statute. The paragraph of the bill pertaining to R.S. section 5202 begins with a quotation mark in the House version of the Conference Report, but the enrolled bill does not. If *either* the Senate version or the House version had made it to the enrolled bill, we would not be here.

The War Finance Corporation Act, in relevant part, re-enacted R.S. section 5202 with a new sixth exception (*See* Appendix C). It did not pertain to the insurance powers and did not repeal those powers since, as indicated above, Section 92 was not a part of R.S. section 5202.

The words of the 1916 statute, with the internal references to "this Act" and "the Federal reserve Act," make sense if and only if the paragraphs following those that obviously amend R.S. section 5202 are not deemed to be made a part of R.S. section 5202. The plain language of the statute must control, not peculiar quotation marks of unknown origin which would have the effect of making portions of the statute gibberish.

CONCLUSION

For all of the reasons stated herein and in the Petition for Writ of Certiorari, we respectfully urge that the Petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 13 of Federal Reserve Act of 1913

POWERS OF FEDERAL RESERVE BANKS.

Sec. 13. Any Federal reserve bank may receive ....

* * *

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

APPENDIX B

1916 Amendments to Federal Reserve Act of 1913

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * *

That section thirteen be, and is hereby amended to read as follows:

* * *

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise,

except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . *Povided* [sic], *however,* That no such bank shall in any case guarantee . . . the payment of any premium on insurance policies issued through its agency by its principal: *And provided*

further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it . . . *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

APPENDIX C

Section 20 of the War Finance Corporation Act of 1918

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—WAR FINANCE CORPORATION.

* * *

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."